L.Ed.2d 70 (1992).

HACEP's official applicant screening policy was effective--Martinez was rejected as a tenant. At issue, then, is HACEP's policy of screening non-tenant occupants and visitors, or lack thereof. Appellants argue that the screening procedure was facially inadequate because it failed to remove and exclude visitors that HACEP knew had criminal histories. By failing to supervise convicted criminals, and by allowing those with criminal histories access to the property, HACEP purportedly demonstrated deliberate indifference. In support of this argument, Appellants rely upon *Doe v. Hillsboro Independent School Dist.*, 81 F.3d 1395, 1403 (5th Cir. 1996), *overruled by*, 113 F.3d 1412, 1415-16 (5th Cir. 1997). *Hillsboro* involved complaints that the district's inadequate hiring procedures--failing to check criminal histories of prospective employees and failing to supervise the custodial staff led them to hire criminals, one of whom raped the plaintiff. *Id.* at 1403. The court found that the allegations satisfied the inadequacy element because common sense recommends, and state law demands, that school officials investigate the criminal histories of prospective employees. The district's total abdication of this responsibility constituted a facially inadequate hiring process. *Id.* The court also decided that the hiring inadequacies revealed a deliberate indifference to the plaintiff's welfare because it constituted such recklessness or gross negligence as to amount to conscious indifference to the plaintiff's constitutional rights.

We first note that the court's opinion in *Hillsboro* was later reversed. In *Hillsboro II*, the court recognized that the plaintiff did not allege that the custodian acted under color of state law but instead argued that the school breached a constitutional duty in failing to protect the plaintiff from a sexual assault. 113 F.3d 1412, 1415-16. The court further recognized the general rule that municipalities have no duty to protect citizens from private action.

Id. at 1416. While acknowledging the potential for section 1983 liability based on egregious hiring decisions, the court refused to endorse the view that a school district has a duty to protect students from threats by third parties. *Id.* Here, as in *Hillsboro II*, Appellants failed to allege that Martinez acted under color of state law. Because they have not established a special relationship between HACEP and its tenants imposing a duty to protect those tenants from criminal acts of third parties, Appellants failed to plead a facially inadequate screening policy. Consequently, Appellants have failed to establish a constitutional violation by a person acting under color of state law.

VIOLATION OF A CONSTITUTIONAL RIGHT

Even assuming that they have identified a person acting under color of state law, Appellants also had to plead that one of their federally-protected rights, privileges, or immunities was implicated. They pled that the children's right to bodily integrity was violated. In support of their argument, they direct us to three Fifth Circuit cases.

In *Shillingford v. Holmes*, 634 F.2d 263, 264 (5th Cir. 1981), *overruled on other grounds, Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), a tourist was struck by a police officer with a nightstick. The court found that the physical abuse was sufficiently severe and disproportionate to the need presented and so deliberate and unjustified as to transcend the bounds of ordinary tort law and constitute a deprivation of constitutional rights. *Id.* at 266. In *Jefferson v. Ysleta Independent School Dist.*, 817 F.2d 303, 305 (5th Cir. 1987), a school teacher tied a second-grade student to a chair during two school days. The court determined that "[t]he right to be free of state-occasioned damage to a person''s bodily integrity [wa]s protected by the fourteenth amendment guarantee of due process." *Id.*, *citing Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). The court concluded that "[a] young student who is not

being properly punished or disciplined has a constitutional right not to be lashed to a chair through the school day and denied, among other things, the basic liberty of access to the bathroom when needed." *Id.* And in *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 446-49 (5th Cir.), *cert. denied, Lankford v. Doe*, 513 U.S. 815, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994), a student was molested by a teacher. The court noted that "[i]f the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protect[ed] a schoolchild from physical sexual abuse--here, sexually fondling a 15-year old school girl and statutory rape--by a public schoolteacher. *Id.* at 451. The court found a clear deprivation of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment and found it incontrovertible that bodily integrity was necessarily violated when a state actor sexually abused a schoolchild because such misconduct deprived the child of rights vouchsafed by the Fourteenth Amendment. *Id.* at 451-52.

Appellants have omitted any reference to *DeShaney v. Winnebago County of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) where the Supreme Court found "that a State's failure to protect an individual against private violence simply d[id] not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. at 1004. It carved exceptions for prisoners and mental patients since the State had imposed limitations on their freedom and ability to care for themselves. *Id.* at 200-01, 109 S.Ct. at 1005-06.

This case does not involve state action akin to the officer-citizen assault in *Shillingford*, the teacher-student lashing in *Jefferson*, or the teacher-student molestation in *Doe*. Appellants have shown no special relationship akin to the *DeShaney* exceptions. We are concerned with molestation by a private actor, not a state actor. Accordingly, Appellants' pleading failed to show a violation of a federally-protected right, privilege, or immunity.

Armstrong as a Defendant

Finally, Appellants complain that the trial court erred in granting Armstrong's plea to the jurisdiction because a supervisory official may be individually liable for her actions where deliberate indifference is shown. But a suit against a public official in her "official capacity" is, in effect, a suit against the municipality the official represents. *Hallmark v. City of Fredericksburg*, 94 S.W.3d 703, 708 (Tex.App.--San Antonio 2002, pet. denied), *citing Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997). Appellants' claim against Armstrong in her official capacity is actually a claim against HACEP and is thus duplicative. *Kentucky*, 473 U.S. at 167 n.14, 105 S.Ct. 3099. And while they appear to argue that Armstrong was also sued in her individual capacity, their petition does not support this contention. The actions complained of involve Armstrong's duties as Project manager for HACEP and her failure to enforce screening procedures. We perceive no individual claim against Armstrong. For all of these reasons, we overrule the sole point and affirm the judgment of the trial court below.

August 19, 2004

/s/

ANN CRAWFORD McCLURE, Justice

Before Panel No. 1

Larsen, McClure, and Chew, JJ.

APPENDIX B

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-03-00224-CV
Appeal from 205th District Court
of El Paso County, Texas
(TC#2000-1111)

ELSA GOMEZ and JOSE RAMIRO GOMEZ,
Individually and on behalf of JOSE GOMEZ
and SERGIO GOMEZ, minor children,
Appellants,

v.

HOUSING AUTHORITY OF THE
CITY OF EL PASO, TEXAS,
Appellee.

ORDER

The Appellants' Motion for Rehearing having been duly considered is denied. Accordingly, it is ORDERED that said motion be and it is hereby DENIED.

IT IS SO ORDERED this 20th day of October, 2004.

/s/ _____
Ann Crawford McClure, Justice

En Banc
Barajas, C.J., McClure and Chew, JJ.

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1313**

April 8, 2005

Mr. Jeffrey B. Pownell
Scherr, Legate & Ehrlich, PLLC
109 N. Oregon 12th Floor
El Paso, TX 79901

Mr. Edward W.Dunbar
Dunbar, Armendariz &
Hegeman, L.L.P.
1700 North Stanton Street
El Paso, TX 79902

RE: Case Number 04-1047
Court of Appeals Number: 08-03-00224-CV
Trial Court Number: 2000-1111

Style: ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND ON BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, MINOR CHILDREN v. HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

Sincerely,

/s/ _____
Andrew Weber, clerk
by Claudia Jenks, Chief Deputy Clerk

cc: Ms. Denise Pacheco
Mr. Gilbert Sanchez

APPENDIX D

IN THE DISTRICT COURT OF
EL PASO COUNTY, TEXAS
205TH JUDICIAL DISTRICT

ELSA GOMEZ, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Cause No. 2000-1111
	)	
HOUSING AUTHORITY OF THE	)	
CITY OF EL PASO, TEXAS,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S PLEA TO THE JURISDICTION

On the 20th day of February, 2003, the Court considered Defendants' Plea to the Jurisdiction in the above-styled and numbered cause. After reviewing all the evidence and upon hearing the arguments of counsel, the Court is of the opinion that the Defendants' Plea to the Jurisdiction should be GRANTED in its entirety.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Plea to the Jurisdiction is hereby GRANTED.

SIGNED this 20th day of February, 2003.

/s/ JUDGE KATHLEEN H. OLIVARES

APPENDIX E

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 2000-1111
COURT OF APPEALS CAUSE NO. 08-03-00224-CV

ELSA GOMEZ and JOSE GOMEZ, ET AL	)	IN THE DISTRICT
V.	)	COURT OF EL
HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS	)	PASO, TEXAS
	)	205TH JUDICIAL
	)	DISTRICT

MOTION FOR NEW TRIAL

BE IT REMEMBERED that on the 5th day of May, 2003, the above styled and numbered cause came on for hearing, before the Honorable Kathleen H. Olivares, Judge of the 205th Judicial District Court in El Paso County, Texas, and the following proceedings were had, to wit:

. . . .

[Reporter's Record Pages 3-7 (of the hearing on Plaintiffs' Motion for New Trial)]

MR. PLOWNELL: I am going to be or try to be very brief on the motion for new trial. As the Court may be aware, my understanding is that the Court granted an order granting the defendant's plea to the jurisdiction on February 20 of 2003.

And we are here on a motion for new trial that I believe was filed March 20 which would have been 28 days later. Keeping in mind there is 28 days in February.

And I think if I counted my days correctly our 75th day is tomorrow which would be May 6. And so one of the reasons why we had to have this hearing in the manner that we did was to make sure that the Court still had that pleniary power.

Basically, Your Honor, I think what I am going to do is try to make it short. There are pleaded claims by the plaintiff not only under the Texas Tort Claims Act but also under the Civil Rights Act, 42 USC 1983, and I know there is some authority – I know counsel has presented us with the Renteria opinion.

And that's an opinion I believe that our law firm was the plaintiffs on. So we are certainly familiar with that opinion. My understanding is that we filed a petition for review with the Texas Supreme Court.

And just to make sure there is no, that I am not hiding anything, I have not seen it but I believe my understanding is that the Court has denied that petition for review.

I think they are still within the window where we could ask for a rehearing but if I am not mistaken, I do believe, I don't have the opinion with me or I don't have the order.

MR. DUNBAR: That is entirely correct.

MR. PLOWNELL: So having said that, Your Honor, rather than -- and I do think the facts in this case, the pleaded facts with respect to the state law claims are at a minimum similar to the pleaded claims in Renteria.

And I am not as familiar with these cases. It is more Mr. Scherr's case but I think it is [sic] unfair in saying that those claims are, at least the pleaded claims are similar.

So what I would like to ask the Court to focus on and what I think there is good grounds for motion for new trial is one the 42 USC 1983 claims on the civil rights claims because those claims were not pleaded in the Renterria petition and the claim is based on the Civil Rights Act and I would suggest to the Court clearly should not be disposed of by way of a plea to the jurisdiction.

My understanding, the test on a plea to the jurisdiction is whether from the face of the pleadings the plaintiff can't win or in this case, in this particular case whether from the, plaintiff from the face of the plaintiff's pleadings the defendant is immune and cannot be sued.

And I think, I believe it is clear from our second amended petition that we pleaded valid cause of action under 42 USC 1983. We have pled a constitutional deprivation.

We have pleaded – I am not sure if the test under what we pleaded is deliberate indifference but -- here it is right in front of me.

Here we go, on page 2 additionally defendants are liable for the claim if the claim is under 28 USC section 1983 under common law violation of it's ministerial duties.

Now I noticed in the defendant's amended response, their first amended plea to the jurisdiction beginning on page 9. The defendant basically admits that we have pleaded cause of action under 42 USC 1983.

Their argument, as I understand it, is that we have not pleaded, that the liability under section 1983 was not inflicted pursuant to an official custom or policy but I would suggest to the Court that really that remedy is by way of special exception.

This is not a tort claims act case where you have to plead facts that would escape or would present the defendant from being immune to liability.

In this case we have an act of Congress, section 1983 which basically affirmatively establishes that the plaintiff has a cause of action for constitutional deprivation that are the moving force of the injuries. And we have pleaded that.

And so their remedy I would suggest was to specially except and after special exceptions to prove either by way of summary judgment or a traditional summary judgment or a no evidence summary judgment that we are not able to prove one or more of our elements our claims under 1983.

But as far as pleading, as far as pleading a valid cause of action this is not like the claim under state law. We have pleaded and once we have pleaded it, the jurisdictional defense simply isn't proper because Congress has affirmatively established that the plaintiff is entitled to a cause of action against government, in this case The Housing Authority or any municipality in general terms.

So I think I have already gone longer than I thought I would, Your Honor, but basically my argument is that it is the wrong remedy for or improper remedy for a 42 USC 1983 claim.

The analysis is different than a claim under the Texas Tort Claims Act. And we believe that, you know, we have pleaded it and their remedy is not for it to be dismissed by way of a plea to the jurisdiction but they can specially except and ask for more specific facts and then they can file their summary judgment if they don't think we can prove those facts.

But we certainly don't think it was appropriate to have it disposed by way of plea to the jurisdiction.

. . . .

[Reporter's Record Pages 9-14 (of the hearing on Plaintiffs' Motion for New Trial)]

MR. PLOWNELL: If I could just briefly respond, Your Honor, I did when I was searching earlier for what we had pleaded I found it in our petition. It goes on for a page-and-a-half beginning on page 3.

And it starts by stating defendant Housing Authority and it's employees acting under color of law and the course and scope of their employment and defendant Housing Authority and defendant Armstrong acting under color of law, deprive plaintiff the rights secured by the Constitution and the laws of the State of Texas and the United States of America.

The plaintiffs rights were a producing cause of plaintiff damages. Specifically plaintiffs would show that defendant housing personnel department management by action or inaction was deliberately indifferent to the occupants of Childrens Constitutional rights of bodily integrity to occupy the premises.

The plaintiffs would also show the defendant Armstrong as apartment manager by action or inaction to the demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises.

And that's subjective deliberate indifference. Additionally defendants acted with deliberate indifference in failing to remove occupants known to have a criminal history from the premises in violation of their rules, failing to exclude from the premises occupants known to have a criminal history, failing to prevent injury on the premises by failing to supervise it's convicted criminals displaying a deliberate indifference to plaintiffs safety and constitutional right. The screening process was inadequate.

The defendants supervisors or employees were deliberately indifferent in following and enforcing the policy and an inadequate policy directly caused plaintiffs injuries. The defendants learned the facts of inappropriate sexual behavior. The defendants demonstrated deliberate indifference towards plaintiffs Constitutional rights by failing to take action that was obviously needed to prevent or stop the abuse and such failure caused injury to the plaintiff.

Defendants actions constitute a violation under the US Constitution giving rise to a civil rights cause of action under 42 USC 1983 and 5th and 14th amendments to the Constitution of the United States.

Defendants are liable to the plaintiffs for the damages hereinafter described together with attorneys fees.

You know, I have seen better pleaded 1983 claims but I have seen much worse pleaded 1983 claims. We have got evidence. We have pleaded both subjective deliberative indifference on behalf of the actual persons involved and objective deliberate indifference with respect to the policies, customs and practices of the Housing Authority.

Now, if I understand the argument, the argument is we didn't plead who the policymaker was. But that's not the issue. We can argue that issue forever.

The key is quite frankly you may not have a policymaker because you can establish a custom, policy or practice by way of a custom which I don't know if I have the magic word, persistent wide-spread practice.

That's the word they avoid as a plaintiff and that's probably the word you focus on as a defendant but be that as it may, here is what we have to do to plead a cause of action under 1983. I am reading directly from the statute.

This is the Scott verses Moore fifth Circuit case, 1996 case but it just recites the statute, section 1983 provides that every person who under color of any statute, ordinance, regulation, custom or use of any state subject or causes to be subjected any person within the jurisdiction of the United States to the deprivation fo any rights secured by the Constitutional law shall be liable to the party injured. That basically is what, you know, that's a section 1983 civil rights claim. That's what you need to plead.

Now, obviously, if they want to know more specifically, you know, what the basis of your claim is so they can prepare for a defense, I don't think there would be

anything inappropriate about that but that would be way of special exceptions.

But this is different from the Texas Tort Claims Act where you have a bit of a hurdle to begin with because you have to affirmatively plead that there is no immunity.

We here have an act of Congress that says, you know, defendant governmental entities are liable if they do this. So once we plead this statute we have affirmatively pleaded the cause of action.

. . . .

THE COURT: I have gone ahead and heard the arguments of counsel on this plaintiff's motion for new trial.

This is an extremely sensitive case just by nature of the facts that took place. It was a difficult decision. I read through the case law when I initially looked at the plea to the jurisdiction and the facts are just difficult to imagine.

Given that fact, though, in reviewing the case law and seeing the arguments of counsel, hearing the arguments of counsel, I am going to deny the plaintiff's motion for new trial and we will move forward.

APPENDIX F

No. 08-03-00224-CV

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF TEXAS
AT EL PASO

ELSA GOMEZ AND JOSE RAMIRO GOMEZ,
INDIVIDUALLY AND ON BEHALF OF JOSE GOMEZ
AND SERGIO GOMEZ, MINOR CHILDREN,
Appellants,
v.
HOUSING AUTHORITY OF THE CITY OF EL PASO,
TEXAS,
Appellee.

Appealed from the 205TH Judicial District Court, El Paso
County, Texas
Honorable Kathleen H. Olivares, Judge Presiding
(Trial Court Cause No. 2000-1111)

BRIEF OF APPELLANTS

Respectfully submitted,
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ORAL ARGUMENT WAIVED

[Pages 3-7 of Appellants' Brief]

ISSUE PRESENTED FOR REVIEW

The trial court erred when it granted Defendant's Plea to the Jurisdiction because Plaintiffs properly pleaded causes of action to which immunity is unavailable, in particular Plaintiffs' claims under federal law for violation of civil rights provided for and arising under 42 U.S.C. § 1983 and the United States Constitution.

STATEMENT OF FACTS

On or about October 29, 1999, Plaintiffs' minor children were tenants and residents at the Machuca Housing Project located at 1039 Sunland Park, El Paso, Texas. [CR 233; App. B.] Defendant El Paso Housing Authority owns and operates the Machuca Housing Project. [CR 234-35; App. B.] Defendant El Paso Housing Authority permitted persons to live and occupy the premises for fifteen days while a background investigation was being conducted. [CR 45.] Defendant El Paso Housing Authority knew Enrique Martinez had been convicted of sexual molestation of a minor after the background investigation was performed, yet allowed him to reside in and occupy the premises. [CR 233; App. B.]

The minor children of Plaintiffs Elsa Gomez and Jose Ramirez Gomez played on the playground designated for occupants on the premises, based on representations made by Defendant to Plaintiffs that the premises would be safe and secure. [CR 233-34; App. B.] Mr. Martinez sexually molested the minor children on Defendant's premises. [CR 233.]

In Plaintiffs' Second Amended Petition, Plaintiffs alleged the following violation of Plaintiffs' civil rights arising under federal law:

Defendant HOUSING and its employees , acting under the color of law and in the course and scope of their employment with Defendant HOUSING, and Defendant ARMSTRONG, acting under the color of law, deprived Plaintiffs of rights secured by the Constitution and Laws of the State of Texas and the United States of America. Said deprivation of Plaintiffs' rights were a producing cause of Plaintiffs' damages. Specifically, Plaintiffs would show that Defendant HOUSING's supervising personnel, its apartment manager, by action or inaction demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises. Plaintiffs would also show that Defendant ARMSTRONG, as apartment manager, by action or inaction demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises.

Additionally, Defendants' inadequate screening procedures in failing to remove occupants known to have a criminal history from the premises, in violation of their rules; failing to exclude from the premises occupants known to have a criminal history; failing to prevent the entry onto the premises of persons known to have a criminal history; and failing to supervise the convicted criminal displayed deliberate indifference to Plaintiffs' safety and constitutional rights. The screening process was inadequate. Defendants' supervising employees were deliberately indifferent in following and enforcing the policy and the inadequate policy directly caused Plaintiffs' injury. Defendants learned the facts of inappropriate sexual behavior. Defendants demonstrated deliberate indifference toward Plaintiffs' constitutional rights by failing to take action that was obviously needed to prevent or stop the abuse and such failure caused constitutional injury to Plaintiffs.

Defendants' actions constitute a violation under the U.S. Constitution, giving rise to a civil rights cause of action under 42 U.S.C § 1983, and Fifth and Fourteenth Amendments of the Constitution of the United States. Defendants are liable to Plaintiffs for the damages hereinafter described, together with attorney's fees. [CR 234-35; App. B (emphasis added).]

SUMMARY OF THE ARGUMENT

Plaintiffs brought claims against Defendant for permitting and allowing a known sexual offender to occupy its premises with deliberate indifference to the constitutionally protected substantive due process rights of the minor children who lived and played on the premises, and such deliberate indifference directly caused the minor children to suffer a deprivation of such constitutionally protected rights when the known sexual offender later molested small children on the premises, including the minor children in this appeal.

The trial court erred in its decision to grant Defendant's Plea to the Jurisdiction because Plaintiffs properly pleaded causes of action under federal law to which immunity is unavailable, in particular claims for violation of civil rights arising under 42 U.S.C. § 1983 and the United States Constitution.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S PLEA TO THE JURISDICTION

A. Standard of review.

A plea to the jurisdiction contests the trial court's authority to determine the subject matter of the cause of action. *Harris County v. Cypress Forest Public Utility Dist. of Harris County*, 50 S.W.3d 551, 553 (Tex. App. – Houston [14th Dist.] 2001, n.p.h.). Subject matter jurisdiction is a legal question, and the plea to the jurisdiction is reviewed by this Court *de novo*. *Id.*;

County of El Paso v. Dorado, 33 S.W.3d 44, 46 (Tex. App. – El Paso 2000, no pet.). When deciding a plea to the jurisdiction, the trial court looks to the allegations in the petition, and accept those allegations as true. *Harris County*, 50 S.W.3d at 553.

Accordingly, this Court's task is to examine the pleadings, to take as true the facts pled, and to determine whether those facts support jurisdiction in the trial court. *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 446 (Tex. 1993). Even if the petition does not allege jurisdictional facts, a plaintiff's suit is subject to dismissal only when it is impossible to amend the pleadings to confer jurisdiction. *Id.*

B. Appellants' state law claims and the *Renteria* decision.

Appellants are mindful that in a similar case, in which another minor child was sexually molested by Mr. Martinez, this Court affirmed a trial court's plea to the jurisdiction as to the claims presented under the Texas Tort Claims Act and state common law. *See Renteria v. Housing Authority of the City of El Paso, Texas*, No. 08-01-00331-CV (Tex.App.–El Paso 2002, pet. denied) (non-published) (App. F). However, in this case, and unlike *Renteria*, appellants presented claims for violations of civil rights arising under federal law, in particular 42 U.S.C. § 1983 and the United States Constitution. [CR 234-35.] It is the trial court's granting of Defendant's plea to the jurisdiction as to these claims that is the subject of this appeal, and to which appellants now turn.

C. Appellants' federal law claims for civil rights violations under 42 U.S.C. § 1983 and the United States Constitution against El Paso Housing Authority.

Section 1983 provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation,

custom, or usage, of any State . . . subjects or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. An actionable section 1983 claim must therefore allege a deprivation of rights secured by the Constitution by a "person" acting under color of state law. *Daniels v. Williams,* 474 U.S. 327, 329-31, 106 S.Ct. 662, 664-65, 88 L.Ed. 2s 662 (1986). Municipalities are "persons" within the meaning of section 1983 and may be held liable if the constitutional harm suffered was the result of an "official policy, custom, or pattern." *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 690-94, 98 S.Ct. 2018, 2035-37, 2039, 56 L.Ed. 2d 611 (1978). Municipalities may not be held liable under section 1983 under either a theory of *respondeat superior* or vicarious liability, or mere negligence in oversight, *see City of Canton v. Harris,* 489 U.S. 378, 387, 109 S.Ct. 1197, 1204, 103 L.Ed. 2d 412 (1989), but municipal liability may attach when officials ignore obvious dangers that will likely lead to constitutional deprivations. *See Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 1973, 128 L.Ed. 2d 811 (1994); *Colle v. Brazos County,* 981 F.2d 237, 246 (5th Cir. 1993). Therefore, to plead a valid cause of action against Defendant El Paso Housing Authority under section 1983, Plaintiffs were required to allege a constitutional deprivation caused by the municipality's adoption or failure to adopt a particular policy, custom or usage that directly caused the constitutional deprivation, and such action or inaction went beyond mere negligent oversight of plaintiff's constitutional rights. *See Monell,* 436 U.S. at 690-94, 98 S.Ct. at 2035-37.

. . . .

[Pages 15-18 of Appellants' Brief]

E. Alternatively, Appellants should have been allowed to amend their pleading to allege claims for civil rights violations under 42 U.S.C. § 1983.

As earlier noted, a plaintiff's suit is subject to dismissal from a plea to the jurisdiction only when it is impossible to amend the pleadings to confer jurisdiction. *See Texas Association of Business,* 852 S.W.2d at 446. In truth, in its First Amended Plea to the Jurisdiction filed October 30, 2002, Defendant El Paso Housing Authority did not really contend Plaintiffs' claims did not confer subject matter jurisdiction on the trial court -- as it could not -- but actually contended Plaintiffs' claims were inadequately pleaded. [fn 1.]

[fn. 1] *See, e.g.,* CR 215 ("Plaintiffs . . . conclusory allegations do not identify the HACEP policymaker . . . "); CR 216 ("Plaintiffs' allegations assert nothing more than liability through [sic] respondent superior. Nor do these allegations constitute a custom or practice" and "[n]o evidence has been presented that the singular conduct of an apartment manager, acting in the course and scope of her authority constitutes an act of policy by the Board of Commissioners"); CR 217 ("[n]o evidence has been presented that the manner in which an apartment manager, acting in the course and scope of her authority, applies the screening policy, constitutes an act of policy by the Board of Commissioners" and ". . . Plaintiffs present no proof of the screening program followed by HACEP employees or that it was unconstitutional. No proof beyond the one incident concerning Plaintiffs has been presented. Most importantly, Plaintiffs made no allegations of indifference to the rights of Plaintiffs by the Board of Commissioners regarding the screening policy. . . . "); CR 218 ("[n]o action of the Board is even mentioned in the Plaintiffs' pleadings" and "[i]t is clear from Plaintiff's pleadings that Plaintiffs rely on [sic] respondent superior to support their Constitutional claim . . . "). [end of footnote]

Defendant's contentions, even if correct, were not

grounds for dismissal, but were curable pleading defects that warranted at most an order sustaining special exceptions and allowing Plaintiffs an opportunity to replead. *See Friesenhahn v. Ryan,* 960 S.W.2d 656, 658-59 (Tex. 1998); *Tex. Dept. of Corrections v. Herring,* 51 S.W.3d 6, 10 (Tex. 1974) (court cannot dismiss a case at the same time it sustains special exceptions).

Appellants strongly believe Plaintiffs' Second Amended Petition alleged claims against Defendants El Paso Housing Authority and Lupe Armstrong for civil rights violations under federal law, in particular 42 U.S.C. § 1983 and the United States Constitution, which conferred subject matter jurisdiction on the trial court. [CR 234-35; App. B.] However, Plaintiffs' alleged pleading defects, if any, were at most curable pleading defects that did not divest the trial court of subject matter jurisdiction. The facts alleged in Plaintiffs' Second Amended Petition, along with Plaintiffs' Response to Defendant El Paso Housing Authority's Plea to the Jurisdiction (CR 38-193; 220-31), show Plaintiffs could have cured any such pleading defects against Defendant El Paso Housing Authority and Lupe Armstrong for civil rights violations under 42 U.S.C. § 1983 and the United States Constitution. Accordingly, the trial court alternatively erred in dismissing Plaintiffs' claims rather than allow Plaintiffs an opportunity to cure any alleged pleading defects, and so allege claims against Defendant El Paso Housing Authority and Lupe Armstrong for civil rights violations under 42 U.S.C. § 1983 and the United States Constitution.

CONCLUSION AND PRAYER

For these reasons, the trial court should not have granted Defendant's plea to the jurisdiction and dismissed Plaintiffs' entire claims, but should have allowed Plaintiffs' claims to proceed against Defendants El Paso Housing

Authority and Lupe Armstrong for civil rights violations under federal law, specifically 42 U.S.C. § 1983 and the United States Constitution, as such claims conferred subject matter jurisdiction on the trial court. Alternatively, the trial court should have allowed the Plaintiffs an opportunity to cure any alleged pleading defects, if any, so as to plead valid claims against Defendants El Paso Housing Authority and Lupe Armstrong for civil rights violations under federal law, in particular 42 U.S.C. § 1983 and the United States Constitution.

WHEREFORE, Appellants ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, Minor Children MARIA RENTERIA, Individually and on Behalf of JESUS RENTERIA, A Minor Child, request this Court reverse the order of the trial court below, and remand this matter for trial on the merits, and award Appellants costs of this appeal, and for such other and further relief, at law or in equity, to which Appellants may show themselves justly entitled.

Respectfully submitted,
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By: /s/ _____
Jeffrey B. Pownell
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2003, a true and correct copy of the foregoing was delivered by first class mail, postage prepaid, to:

Michael C. Crowley
Edward Dunbar
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/s/ _____
Jeffrey B. Pownell

APPENDIX G

No. 08-03-00224-CV

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF TEXAS
AT EL PASO

ELSA GOMEZ AND JOSE RAMIRO GOMEZ,
INDIVIDUALLY AND ON BEHALF OF JOSE GOMEZ
AND SERGIO GOMEZ, MINOR CHILDREN,
Appellants,
v.
HOUSING AUTHORITY OF THE CITY OF EL PASO,
TEXAS,
Appellee.

APPELLANTS' MOTION FOR REHEARING

TO THE HONORABLE EIGHTH COURT OF APPEALS:

Appellants ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, Minor Children, submit this motion for rehearing in response to the Judgment and Opinion issued by the Court on August 19, 2004, affirming the plea to the jurisdiction granted in favor of Appellees HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS ("HACEP"), dismissing all of Appellants' claims below for lack of subject matter jurisdiction, and in support of same would respectfully request the Court reconsider the following issues on rehearing:

ISSUES PRESENTED FOR REVIEW ON REHEARING

Whether the Court of Appeals erred in affirming the plea to the jurisdiction, when the United States Supreme Court has ruled (1) state courts have jurisdiction over §1983 claims and state courts may not construe state substantive or procedural laws or rules to deny jurisdiction of such claims in a way that discriminates against such federal causes of action; (2) the question of sovereign immunity in §1983 claims is to be decided under federal law, not state law; and (3) under federal law, municipalities and similar governmental entities such as HACEP are "persons" subject to liability under §1983 and therefore not immune from liability or suit.

Whether the decision of the Court of Appeals in affirming the plea to the jurisdiction, and therefore denying subject matter jurisdiction to the appellants over their §1983 claims against "persons" subject to liability under federal law, violates the Supremacy Clause (Article 6, Clause 2) of the United States Constitution.

Whether the decision of the Court of Appeals in construing the plea to the jurisdiction as the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim, or other decision on the merits -- a non-neutral application of a policy or rule not recognized under Texas law -- violates procedural and substantive due process and therefore contravenes the Fifth Amendment of the United States Constitution, as applied to state action through the Fourteenth Amendment of the United States Constitution, and the due course of law guarantee of the Texas Constitution (Article I, Section 19).

ARGUMENT AND AUTHORITY

1. Defendants HACEP and Lupe Armstrong are "persons" under § 1983 and therefore not immune from suit or liability under federal law.

The Court noted in its Opinion that under Texas law "[a] plea to the jurisdiction is a dilatory plea by which a party contests the trial court's authority to determine the *subject matter* of the cause of action." Opinion, p. 4 (emphasis added) (citations omitted). The Court then discussed Texas *state law* of sovereign immunity, which under *state law* encompasses dual principles of immunity from liability and immunity from suit, and stated "[i]mmunity from suit bars a suit against the State unless immunity is waived by constitutional provision or legislative enactment." Opinion pp. 4-5 (citations omitted). The Court then looked to whether *state law* sovereign immunity protected the defendants from suit as its grounds for deciding the trial court lacked subject matter jurisdiction over the case and affirming the plea to the jurisdiction. Opinion, pp. 5-14.

Appellants respectfully suggest the Court's analysis is incorrect. In *Howlett v. Rose,* 496 U.S. 354, 110 S.Ct. 2430, 110 L.Ed. 332 (1990), a former high school student filed a complaint in a Florida state court alleging an assistant principal had made an illegal search of his car while parked on school premises, and was wrongfully suspended from class for five days. *Howlett,* 110 S.Ct. at 2433-34. He brought various claims against the school board and three school officials, including a §1983 claim for violation of his rights under the Fourth and Fourteenth Amendments. *Id.* The Florida appellate court affirmed the district court's dismissal of his §1983 claim on the ground that "the availability of sovereign immunity is a matter of state law, and that Florida's statutory

waiver of sovereign immunity did not apply to §1983 claims," and "rejected the argument that whether a State has maintained its sovereign immunity from a §1983 suit in its state courts is a question of federal law." *Id.* at 2434. The Florida Supreme Court thereafter denied review. *Id.*

On writ of certiorari, the United States Supreme Court reversed and remanded. *Id.* at 2447. In its opinion, Justice Stevens noted "[s]tate courts as well as federal courts have jurisdiction over §1983 cases" and "[t]he question in this case is whether a state law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." *Id.* at 2433. Justice Stevens later made clear in his opinion that the question of sovereign immunity in a §1983 claim is decided by *federal* law, not state law:

> A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom has Congress has not subjected to liability. [citations omitted.] Since this Court has construed the word "person" in §1983 to exclude States, neither a federal court nor a state court may entertain a §1983 action against such a defendant. **Conversely, since the Court has held that municipal corporations and similar governmental entities are "persons,"** [citations omitted] **a state court entertaining a §1983 action must adhere to that interpretation. "Municipal defenses -- including an assertion of sovereign immunity -- to a federal right of action are, of course, controlled by federal law." *Owen v. City of Independence,* 445 U.S. at 647, n. 30, 100**

> **S.Ct. at 1413, n. 30. "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.* at 647-48, 100 S.Ct. at 1413-14 (footnote omitted).**

Howlett, 110 S.Ct. at 2442-2443 (emphasis added); *see also Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980) ("[w]e turn then to appellants' § 1983 claim . . . [i]t is clear that the California immunity statute [that purported to immunize public entities and employees from liability for parole release decisions] does not control this claim even though the federal cause of action is being asserted in the state courts"); *Felder v. Casey*, 487 U.S. 131, 143, 108 S.Ct. 2302, 2309, 101 L.Ed. 2d 123 ("[t]he decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override").

Here, it is beyond dispute that Defendant HACEP is not an "arm of the state," but a municipal corporation or other similar non-state governmental entity that is a "person" subject to § 1983 liability, and "[f]ederal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations" and therefore not immune from liability or suit under federal law. *See Howlett,* 110 S.Ct. at 2443, citing to *St. Louis v. Praprotnik,* 485 U.S. 112, 121-122, 108 S.Ct. 915, 922-924, 99 L.Ed. 2d 107 (1988); *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

Defendants HACEP and Armstrong do not have sovereign immunity from liability or suit under *federal* law. The plea to the jurisdiction should not have been granted in this case. The trial court's order granting the plea to the jurisdiction must be reversed.

2. This Court cannot construe the plea to the jurisdiction as a 12(b)(6) motion or other decision on the merits, because its use in such a manner -- not recognized under Texas law -- is a non-neutral policy that denies jurisdiction to the Plaintiffs in a way that discriminates against their federal claims.

At oral argument, Justice Larsen asked appellants' counsel whether the Court may treat the trial court's plea to the jurisdiction as the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim. Although not expressly stating so, it appears the Court may have done just that. *See* Opinion, pp. 5-14.

Appellants respectfully suggest this is improper. In *Howlett,* the respondents' *amici* suggested states should be permitted to craft immunity from § 1983 claims under state law because such actions "are more likely to be frivolous than are other suits." *Howlett,* 110 S.Ct. at 2444-45. The Supreme Court responded to this argument as follows:

> The argument by *amici* that suits predicated on federal law are more likely to be frivolous and have less of an entitlement to the State's limited judicial resources warrants little response. **A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a**

> **whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make.**

Howlett, 110 S.Ct. at 2445 (emphasis added).

As the Court acknowledged in its Opinion, a plea to the jurisdiction is a "dilatory plea by which a party contests the trial court's authority to determine the *subject matter* of the cause of action," and the Court "*do*[es] *not examine the merits of the case*." Opinion, p. 4. Moreover, the Texas legislature and courts have not enacted or adopted a substantive or procedural rule of any kind that permits Texas courts to construe a plea to the jurisdiction -- which contests the trial court's subject matter jurisdiction over the case and is by definition *not* a decision on the merits -- as the equivalent of a 12(b)(6) motion for failure to state a claim or similar motion which *is* a decision on the merits. Notwithstanding this, under the guise of a plea to the jurisdiction analysis, the Court's fourteen page opinion in reality addresses the *merits* of each element of the Plaintiffs' § 1983 claims. Opinion, pp. 5-14. In so doing, the Court in reality construed the plea to the jurisdiction as a 12(b)(6) motion or other decision on the merits.

The Court's use of the plea to the jurisdiction in such a manner -- not recognized under Texas law -- is not a recognized "neutral procedural rule to discourage frivolous litigation of all kinds," but is a non-neutral and discriminatory non-existent rule that denies jurisdiction to the Plaintiffs over their § 1983 claims, and unfairly and improperly denies the Plaintiffs their right to a state court decision on the merits pursuant to neutrally applied state procedural rules. *See Howlett,* 110 S.Ct. at 2440-2442 (noting that "States may

apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law," then noting "[o]n only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action [and] [e]ach of them involved a neutral rule of judicial administration" such as a state statutes that permitted discretionary dismissal of both federal and state claims on *forum non conveniens* grounds, territorial jurisdictional grounds, or where neither party was a resident of the forum state).

3. Constitutional violations.

"The adequacy of a state-law ground to support a judgment precluding litigation of a federal claim in state court is itself a federal question which the United States Supreme Court may review *de novo." Howlett,* 110 S.Ct. at 2437.

To the extent this Court looked to state law to determine whether Defendants HACEP and Lupe Armstrong were not "persons" under § 1983 or otherwise protected by the state law doctrine of sovereign immunity and immune from liability or suit, then such action contravenes the Supremacy Clause (Article 6, Clause 2) of the United States Constitution. *See Howlett,* 110 S.Ct. at 2443-2445 ("[t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law").

To the extent this Court construed the plea to the jurisdiction as a the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim or other decision on the merits -- a non-neutral application of a policy or rule not recognized under Texas law -- then such action violates the Supremacy

Clause (Article 6, Clause 2), and also violates procedural and substantive due process and therefore contravenes the Fifth Amendment of the United States Constitution, as applied to state action through the Fourteenth Amendment of the United States Constitution, and the due course of law guarantee of the Texas Constitution (Article I, Section 19). *See Howlett,* 110 S.Ct. at 2440-2442; *see also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L Ed. 2d 265 (1982); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed. 2d 548 (1972); *Univ. of Texas Medical School at Houston v. Than,* 901 S.W.2d 926, 929-34 (Tex. 1995).

CONCLUSION AND PRAYER

The Court's fourteen page opinion addressing the merits of each element of the Plaintiffs' § 1983 claim indicates a belief that, for whatever reasons, the Plaintiffs would be hard-pressed to survive a decision on the merits at trial based on the evidence in the record on appeal. *See* Opinion, pp. 4-15. To this end, however, it bears note that in the two seminal United States Supreme Court decisions regarding a state court's jurisdiction to hear § 1983 claims – *Martinez* and *Howlett* -- the Court either indirectly noted the apparent difficulties to surmount in the plaintiff's § 1983 claims (*Howlett)* or in fact reached an adverse decision on the merits of the plaintiffs' § 1983 claims (*Martinez*).[fn1.]

[fn1.] In *Howlett* the plaintiffs' § 1983 claim against a school board and three school officials was based on an alleged unconstitutional search of his car that resulted in a *five day suspension from school.* The Supreme Court noted in a footnote that "[t]he school board, of course, could only be held liable if, as a matter of state law, it had delegated final decision making authority in this area to the school principal and assistant principal."

Howlett, 110 S.Ct. at 2434 n. 2. In *Martinez,* the plaintiffs' § 1983 claim against the California Parole Board and parole officials was based on an unconstitutional deprivation of life when a fifteen year old girl was murdered by a parolee who was released early. The Supreme Court noted "that the California courts *accepted jurisdiction of this federal claim," Martinez,* 100 S.Ct. at 558 n. 7, then affirmed the trial court's decision to *sustain a demurrer to the complaint* (*i.e.,* a decision on the merits) that "the appellants have not alleged a claim for relief under federal law" because "at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officer's action to hold them responsible under the federal civil rights law." *Id.* at 556, 559. In both cases, neither the apparent (*Howlett)* or even *actual* (*Martinez*) problems of the merits of the plaintiffs' respective § 1983 claims dissuaded the Supreme Court from stating, or even suggesting state courts lacked jurisdiction to entertain such claims and render a decision on the merits, which is what the Court has done here. [end of footnote]

As the Court acknowledged in its Opinion, in this appeal of a plea to the jurisdiction, the question presented is whether the trial court has subject matter jurisdiction to hear the Plaintiffs' § 1983 claims, and the Court does not examine the merits of the case. Opinion, p. 4. Here, as Defendant HACEP is not an "arm of the state," but a municipal corporation or other similar non-state governmental entity that is a "person" subject to § 1983 liability, "[f]ederal law makes [such] governmental defendants . . . liable for their constitutional violations" and therefore are not immune from liability or suit under federal law. *See Howlett,* 110 S.Ct. at 2443 (citations omitted). Defendants HACEP and Armstrong do not have sovereign immunity from liability or suit under *federal* law. The plea to the jurisdiction should not have been granted in this case. The trial court's order granting the plea to the jurisdiction must be reversed.

For these reasons, the trial court should not have granted the plea to the jurisdiction and dismissed Plaintiffs' claims, but should have allowed Plaintiffs' claims to proceed against Defendants El Paso Housing Authority and Lupe Armstrong for civil rights violations under federal law, specifically 42 U.S.C. § 1983 and the United States Constitution, as such claims conferred subject matter jurisdiction on the trial court.

WHEREFORE, Appellants ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, Minor Children, request this Court to grant the motion for rehearing and on rehearing, reverse the order of the trial court below, and remand this matter for trial on the merits, and award appellants costs of this appeal, and for such other and further relief, at law or in equity, to which appellants may show themselves justly entitled.

Respectfully submitted,
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By: /s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2004, a true and correct copy of the foregoing was delivered by first class mail, postage prepaid, to:

Edward Dunbar
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/s/ _____
Jeffrey B. Pownell

APPENDIX H

No. 04-1047

IN THE SUPREME COURT
OF TEXAS

ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND ON BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, MINOR CHILDREN,
Petitioners,

v.

HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS,
Respondent.

Appealed from the 205th Judicial District Court, El Paso County, Texas
Honorable Kathleen H. Olivares, Judge Presiding
(Trial Court Cause No. 2000-1111)
(Eighth District Court of Appeals No. 08-03-00224-CV)

PETITION FOR REVIEW

Respectfully submitted,
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[Pages 4-15 of the Petition for Review]

ISSUES PRESENTED FOR REVIEW

Issue One: The Eighth Court of Appeals erred when it affirmed Defendant's plea to the jurisdiction because the Plaintiffs pleaded claims against the Defendant arising under 42 U.S.C. § 1983 and the United States Constitution, and the United States Supreme Court has ruled (1) the question of immunity from suit in such claims is a matter of federal law, not state law, (2) under federal law, non-state governmental entities such as HACEP are "persons" subject to liability under Section 1983 and therefore not immune from liability or suit; and (3) state courts have concurrent jurisdiction over Section 1983 claims and may not construe state laws or rules to deny jurisdiction of such claims in a way that discriminates against such federal claims.

Issue Two: The Eighth Court of Appeals erred when it affirmed Defendant's plea to the jurisdiction because the decision to deny subject matter jurisdiction to the Plaintiffs over their Section 1983 claims against "persons" such as HACEP that are not immune from liability or suit under federal law contravenes the Supremacy Clause (Article 6, Clause 2) of the United States Constitution.

Issue Three: The Eighth Court of Appeals erred when it affirmed Defendant's plea to the jurisdiction because the appellate court's decision to construe the plea to the jurisdiction as the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim -- or other decision on the merits -- constituted a discriminatory application of a policy or rule not otherwise recognized under Texas law, and so violated procedural and substantive due process and contravened the Fifth Amendment of the United States Constitution, as applied to state action through the Fourteenth Amendment of the United States Constitution.

STATEMENT OF FACTS

The opinion of the court of appeals does not correctly state the nature of the case, in that the appellate court failed to recognize the question presented was whether the trial court had subject matter jurisdiction over the case. Instead, the appellate court, in a fourteen page opinion, decided the Plaintiffs' section 1983 claims on the merits. [fn 1.]

[fn 1.] This misunderstanding is perhaps most clearly reflected in the very first sentence of the appellate court opinion, which states: "We consider today the *liability* of the Housing Authority (HACEP) for federal civil rights violations arising from the sexual molestation of two children at a housing project." *Gomez,* 148 S.W.3d at 475 (emphasis added). [end of footnote]

The facts and procedural background pertinent to the issues presented in this petition are as follows: Plaintiffs' Second Amended Petition (the live petition at the time the plea to the jurisdiction was granted) pleaded the following: On or about October 29, 1999, Plaintiffs' minor children were tenants and residents at the Machuca Housing Project located at 1039 Sunland Park, El Paso, Texas. [CR 233; App. B.] Defendant HACEP owns and operates the Machuca Housing Project. [CR 234-35; App. B.] Defendant HACEP permitted persons to live and occupy the premises for fifteen days while a background investigation was being conducted. [CR 45.] Defendant HACEP knew Enrique Martinez had been convicted of sexual molestation of a minor after the background investigation was performed, yet allowed him to reside in and occupy the premises. [CR 233; App. B.] The minor children of Plaintiffs Elsa Gomez and Jose Ramirez Gomez played on the playground designated for occupants on the premises, based on representations made by Defendant to Plaintiffs that the premises would be safe and secure. [CR 233-

34; App. B.] Mr. Martinez sexually molested the minor children on Defendant's premises. [CR 233.]

In Plaintiffs' Second Amended Petition, Plaintiffs alleged violations of Plaintiffs' civil rights against Defendant HACEP and its employees arising under federal law:

> Defendant HOUSING and its employees , acting under the color of law and in the course and scope of their employment with Defendant HOUSING, and Defendant ARMSTRONG, acting under the color of law, deprived Plaintiffs of rights secured by the Constitution and Laws of the State of Texas and the United States of America. Said deprivation of Plaintiffs' rights were a producing cause of Plaintiffs' damages. Specifically, Plaintiffs would show that Defendant HOUSING's supervising personnel, its apartment manager, by action or inaction demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises. Plaintiffs would also show that Defendant ARMSTRONG, as apartment manager, by action or inaction demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises.
>
> Additionally, Defendants' inadequate screening procedures in failing to remove occupants known to have a criminal history from the premises, in violation of their rules; failing to

exclude from the premises occupants known to have a criminal history; failing to prevent the entry onto the premises of persons known to have a criminal history; and failing to supervise the convicted criminal displayed deliberate indifference to Plaintiffs' safety and constitutional rights. The screening process was inadequate. Defendants' supervising employees were deliberately indifferent in following and enforcing the policy and the inadequate policy directly caused Plaintiffs' injury. Defendants learned the facts of inappropriate sexual behavior. Defendants demonstrated deliberate indifference toward Plaintiffs' constitutional rights by failing to take action that was obviously needed to prevent or stop the abuse and such failure caused constitutional injury to Plaintiffs. Defendants' actions constitute a violation under the U.S. Constitution, giving rise to a civil rights cause of action under 42 U.S.C § 1983, and Fifth and Fourteenth Amendments of the Constitution of the United States. Defendants are liable to Plaintiffs for the damages hereinafter described, together with attorney's fees. [CR 234-35; App. B.]

SUMMARY OF THE ARGUMENT

The plea to the jurisdiction should not have been granted. Federal law, not state law supplies the rule of decision to determine whether Defendants HACEP and Lupe Armstrong were immune from suit from Plaintiffs' section 1983 claims. Under federal law, Defendants HACEP and its employees are "persons"and therefore not immune from

liability or suit for section 1983 claims brought against it.

This should have ended the appellate court's inquiry. The appellate court should have reversed the trial court's order granting the plea to the jurisdiction and remanded the case to the trial court for a determination of the Plaintiffs' section 1983 claims on the merits. Instead, the appellate court appears to have reviewed and decided the case on the merits, which was improper.

The appellate court erred in its decision to affirm the trial court's order granting the plea to the jurisdiction because Plaintiffs properly pleaded causes of action under federal law against Defendant HACEP and its employees for which immunity from suit is unavailable, in particular claims against it for violation of civil rights arising under 42 U.S.C. § 1983 and the United States Constitution. Like the appellate court in this case, Texas appellate courts have failed to consistently recognize that state courts are required to apply federal substantive law as the rule of decision to determine whether a party is immune from suit for Section 1983 claims arising under federal law. [fn 2.] This Court should accordingly grant the petition for review.

[fn 2.] *See, e.g., Housing Authority of the City of El Paso v. Yepez,* 2003 WL 21991544 (Tex. App. -- El Paso 2003, pet. denied) (unpublished) ("HACEP's plea to the jurisdiction with regard to Appellees' [section 1983] claim does not give rise to this Court's jurisdiction to entertain an interlocutory appeal, and we will not address those issues"); *compare with City of Forth Worth v. Robles,* 51 S.W.2d 436, 444 (Tex. App. -- Fort Worth 2001, pet. denied) ("[W]e conclude that Robles did not complain of the deprivation of a federal right that invokes the protection of section 1983. As such, Robles's pleading was insufficient to invoke the trial court's jurisdiction over her section 1983 claim."). [end of footnote]

ARGUMENT AND AUTHORITY

A. A plea to the jurisdiction is a state procedural rule used to determine whether the trial court has subject matter jurisdiction over the case.

Petitioners agree with the appellate court's recitation of the standard of review of an order granting a plea to the jurisdiction. *See Gomez,* 148 S.W.3d at 476-77. In particular, the appellate court noted in its opinion that under Texas procedural law

> A plea to the jurisdiction is a dilatory plea by which a party contests the trial court's authority to determine the subject matter of the cause of action . . . [s]ubject matter jurisdiction is a legal question which we review *de novo.* We look solely to the allegations in the petition and accept them as true. We do not examine the merits of the case. If the petition does not allege jurisdictional facts, the plaintiff's suit is subject to dismissal only when it is impossible to amend the pleadings to confer jurisdiction.

Id. (citations omitted).

B. Federal law, not state law, determines whether a party is immune from liability or suit for Plaintiffs' Section 1983 claims.

After noting the standard of appellate review in a plea to the jurisdiction, the appellate court incorrectly discussed Texas *state law* of sovereign immunity, which encompasses dual principles of immunity from liability and immunity from suit. *See* Opinion pp. 4-5. Petitioners respectfully suggest the appellate court's analysis is incorrect. In this reverse-*Erie* situation, the United States Supreme Court has made clear federal law determines whether Defendants HACEP and its employees are immune from suit in Plaintiffs' section 1983

claims. *See, e.g., Owen v. City of Independence,* 445 U.S. 622, 647 n.30, 100 S.Ct. 1398, 1413 n. 30, 63 L.Ed.2d 673 (1980); *Howlett v. Rose,* 496 U.S. 354, 375-76, 110 S.Ct. 2430, 2442-43, 110 L.Ed. 332 (1990).

In *Howlett*, a former high school student filed a complaint in a Florida state court alleging an assistant principal made an illegal search of his car while parked on school premises and was wrongfully suspended from class for five days. *Howlett,* 110 S.Ct. at 2433-34. He brought various claims against the school board and three school officials, including a Section 1983 claim for violation of his rights under the Fourth and Fourteenth Amendments. *Id.* The Florida appellate court affirmed the district court's dismissal of his §1983 claim on the ground that "the availability of sovereign immunity is a matter of state law" and Florida's waiver of sovereign immunity did not apply to §1983 claims. *Id.* at 2434. The Florida Supreme Court thereafter denied review. *Id.*

On writ of certiorari, the Supreme Court reversed and remanded. *Id.* at 2447. In its opinion, Justice Stevens first noted "[s]tate courts as well as federal courts have jurisdiction over §1983 cases . . ." *Id.* at 2433. Justice Stevens made clear the question of sovereign immunity in a Section 1983 claim is decided by federal law:

> A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability. [citations omitted.] Since this Court has construed the word "person" in §1983 to exclude States, neither a federal court nor a state court may entertain a §1983 action against such a defendant. Conversely, since the Court has held that municipal corporations and

similar governmental entities are "persons," [citations omitted] **a state court entertaining a §1983 action must adhere to that interpretation. "Municipal defenses -- including an assertion of sovereign immunity -- to a federal right of action are, of course, controlled by federal law.**" *Owen v. City of Independence,* 445 U.S. at 647, n. 30, 100 S.Ct. at 1413, n. 30. "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.* at 647-48, 100 S.Ct. at 1413-14 (footnote omitted).

Howlett, 110 S.Ct. at 2442-2443 (emphasis added).[fn. 3.]

[fn. 3.] *See also Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980) ("[w]e turn then to appellants' § 1983 claim . . . [i]t is clear that the California immunity statute [that purported to immunize public entities and employees from liability for parole release decisions] does not control this claim even though the federal cause of action is being asserted in the state courts"); *Felder v. Casey,* 487 U.S. 131, 143, 108 S.Ct. 2302, 2309, 101 L.Ed. 2d 123 (1988) ("[t]he decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override"). [end footnote.]

C. Under federal law, Defendants HACEP and its employees are "persons" and therefore not immune from liability or suit in Plaintiffs' Section 1983 claims brought against them.

The Supreme Court has concluded that "[f]ederal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations" and therefore not immune from liability or suit for Section 1983 claims. *See Howlett,* 110 S.Ct. at 2443, citing to *St. Louis v. Praprotnik,* 485 U.S. 112, 121-122, 108 S.Ct. 915, 922-924, 99 L.Ed. 2d 107 (1988); *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

Here, it is beyond dispute that Defendant HACEP is not an "arm of the state," but a municipal corporation or other similar non-state governmental entity that is a "person" subject to § 1983 liability, and therefore does not have sovereign immunity from liability or suit under federal law. Plaintiffs' Section 1983 claims against Defendant HACEP and Lupe Armstrong accordingly conferred subject matter jurisdiction on the trial court, and the appellate court's inquiry should have ended, rather than started, here. *See Gomez,* 148 S.W.3d at 478 (acknowledging that "[m]unicipalities and other local government units are "persons" within the meaning of section 1983 and may be liable for a constitutional tort suffered as the result of an official policy, custom or pattern" (citations omitted). The appellate should have reversed and remanded to the trial court for a determination of Plaintiffs' section 1983 claims on the merits.

D. The appellate court improperly construed the plea to the jurisdiction as a review of a 12(b)(6) motion or other equivalent decision on the merits.

At oral argument before the court of appeals, one justice asked appellants' counsel if the appellate court could treat the trial court's order granting the plea to the jurisdiction as the equivalent of a 12(b)(6) motion to dismiss for failure to

state a claim. Although not stating so, it appears the appellate court did just that. *See* Opinion, pp. 5-14. [fn. 4.]

[fn. 4.] Two examples illustrate this conclusion. First, the appellate court opinion begins by stating "[w]e consider today the *liability* of the Housing Authority (HACEP) for federal civil rights violations arising from the sexual molestation of two children at a housing project." *Gomez,* 148 S.W.3d at 475. Second, in its lengthy discussion of Section 1983, every case cited by the appellate court that involved the application or interpretation of Section 1983 also involved a decision on the merits; conversely, the appellate court never cited authority -- state or federal -- for its conclusions that Plaintiffs "failed to plead a jurisdictional requisite" or otherwise failed to invoke the trial court's subject matter jurisdiction. *Id* at 477-82. [end of footnote.]

This was improper. The Supreme Court has made clear state courts cannot apply state procedural rules in a discriminatory manner to discourage federally protected claims. For example, in *Howlett,* an *amici* suggested states should be permitted to craft immunity from § 1983 claims under state law because such actions "are more likely to be frivolous than are other suits." *Howlett,* 110 S.Ct. at 2444-45. The Supreme Court responded to this argument as follows:

> The argument by *amici* that suits predicated on federal law are more likely to be frivolous and have less of an entitlement to the State's limited judicial resources warrants little response. A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the

> claim has no merit, that judgment is not up to the States to make.

Howlett, 110 S.Ct. at 2445.

As the appellate court noted, a plea to the jurisdiction is a "dilatory plea by which a party contests the trial court's authority to determine the *subject matter* of the cause of action," and the Court "*do*[es] *not examine the merits of the case*." Opinion, p. 4 (emphasis added). The Texas legislature and courts have not enacted, adopted, or recognized a rule that permits Texas courts to construe a plea to the jurisdiction -- which contests the trial court's subject matter jurisdiction over the case and is not a decision on the merits -- as the equivalent of a 12(b)(6) motion for failure to state a claim or similar motion – which is a decision on the merits.

Notwithstanding this, the appellate court's fourteen page opinion addresses the merits of each element of the Plaintiffs' section 1983 claims. Opinion, pp. 5-14. In so doing, the Court appears to have construed the plea to the jurisdiction as a 12(b)(6) motion or other decision on the merits. The appellate court's use of the plea to the jurisdiction in this way is not a recognized "neutral procedural rule to discourage frivolous litigation of all kinds," but a non-neutral rule that denied subject matter jurisdiction to the Plaintiffs over their section 1983 claims and their federally protected right to a decision on the merits pursuant to neutrally applied state procedural rules. [fn. 5.]

[fn. 5.] *See Howlett,* 110 S.Ct. at 2440-2442 (noting that "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law," then noting "[o]n only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action [and] [e]ach of them involved a neutral rule of judicial administration" such as a

state statutes that permitted discretionary dismissal of both federal and state claims on *forum non conveniens* grounds, territorial jurisdictional grounds, or where neither party was a resident of the forum state). [end of footnote.]

If the appellate court looked to state law to determine whether Defendants HACEP and Lupe Armstrong were immune from suit, then such action contravened the supremacy clause (Article 6, Clause 2) of the United States Constitution. [fn. 6] If the appellate court required the Plaintiffs prove each element of their section 1983 claims in order to *invoke the trial court's jurisdiction,* then the appellate court improperly reviewed the plea to the jurisdiction. If the appellate court construed the plea to the jurisdiction as a the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim or other decision on the merits, then the court misapplied the standard of appellate review of a plea to the jurisdiction, and contravened the supremacy clause and violated procedural and substantive due process and therefore contravened the Fifth Amendment of the United States Constitution (as applied to state action through the Fourteenth Amendment of the United States Constitution). [fn. 7.]

[fn. 6.] *See Howlett,* 110 S.Ct. at 2443-2445 ("[t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law"). [end of footnote]

[fn. 7.] *See Howlett,* 110 S.Ct. at 2440-2442; *see also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L Ed. 2d 265 (1982); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed. 2d 548 (1972); *Univ. of Texas Medical School at Houston v. Than,* 901 S.W.2d 926, 929-34 (Tex. 1995). [end of footnote]

CONCLUSION AND PRAYER

As the appellate court noted in its opinion, in this appeal of a plea to the jurisdiction, the question presented is whether the trial court has subject matter jurisdiction to hear the Plaintiffs' section 1983 claims, and appellate courts do not examine the merits of the case. Here, as Defendant HACEP is not an "arm of the state," but a municipal corporation or other similar non-state governmental entity that is a "person" subject to section 1983 liability, "[f]ederal law makes [such] governmental defendants . . . liable for their constitutional violations" and therefore not immune from liability or suit under federal law. *See Howlett,* 110 S.Ct. at 2443 (citations omitted). Defendants HACEP and Armstrong do not have sovereign immunity from liability or suit under federal law.

It may well be true that Texas appellate courts engage in more rigorous scrutiny of a Plaintiffs' claims when immunity is at issue under state law (as earlier occurred in the companion proceeding in this case) [fn. 8], but that is because state law requires such scrutiny. Immunity from suit under section 1983 claims is not the same. Plaintiffs' pleaded section 1983 claims against Defendants HACEP and Lupe Armstrong and invoked the trial court's subject matter jurisdiction. Plaintiffs were entitled to obtain either a decision on the merits, or fair notice that the trial court's order granting a plea to the jurisdiction would be reviewed as a decision on the merits on appeal. They received neither.

[fn. 8.] *See Renteria v. Housing Authority of City of El Paso,* 96 S.W.3d 454, 457 (Tex. App. – El Paso 2002, pet. denied). [end of footnote]

The plea to the jurisdiction should not have been affirmed in this case. The appellate court should have

reversed and remanded to allow Plaintiffs' claims to proceed against Defendants El Paso Housing Authority and Lupe Armstrong for civil rights violations under federal law, specifically 42 U.S.C. § 1983 and the United States Constitution, as such claims conferred subject matter jurisdiction on the trial court.

This Court should accordingly grant the petition for review.

WHEREFORE, PREMISES CONSIDERED, Petitioners ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, Minor Children, request this Court to grant the petition for review, reverse the order of the courts below in all respects and remand for trial of Plaintiffs' section 1983 claims on the merits, award costs, and for such other and further relief, at law or in equity, to which Petitioners may show themselves justly entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 14rd day of January, 2005, a true and correct copy of the foregoing was delivered by first class mail, postage prepaid, to:

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